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Legal Impediments Facing Nonimmigrants Entering Licensed Professions

LEGAL IMPEDIMENTS FACING NONIMMIGRANTS ENTERING LICENSED PROFESSIONS

By Justin Storch¹

In 2005, Karen LeClerc, Guillame Jarry, Beatrice Boulord, Maureen Affleck, Caroline Wallace, and Emily Maw sought admission to the Louisiana Bar.² Emily Maw, a graduate of Tulane University Law School, and the others, who were graduates of law schools outside the United States, were all in the United States legally on J-1 or H-1B visas.³ J-1 visas allow participants in exchange-visitor programs to travel to the United States, whereas H-1B visas provide opportunities for foreign workers in specialty occupations to work in the United States.

Despite their good academic standing, and the fact that Emily Maw possessed a U.S. law degree, the United States Court of Appeals for the Fifth Circuit, in *LeClerc v. Webb* upheld a Louisiana Supreme Court rule prohibiting these foreign born individuals from taking the Louisiana Bar due to their lack of legal permanent resident (LPR) status.⁴ LPR status is given to immigrants with the right to reside in the U.S. permanently. In denying non-LPRs from taking the bar examination, the State of Louisiana denied them an opportunity to practice law in the state, denied Louisiana employers an opportunity to hire them (as well as other U.S. employers who need attorneys barred in Louisiana), and denied U.S. citizens in need of legal services from utilizing and benefitting from their legal skills and knowledge.

Had any of these individuals been LPRs, they would have been allowed to take the Louisiana bar exam. The rule regarding LPRs and licensure exams finds its origins in *In Re Griffiths*, where in 1973 the Supreme Court invalidated a Connecticut law that prohibited non-U.S. citizens from taking the Connecticut bar exam.⁵ Since then, states have not been able to discriminate against LPRs seeking licensure in their respective professions.

If states cannot deny LPRs an opportunity to take the tests required for licensure, why were the plaintiffs in *LeClerc* denied the same opportunity? Despite the ruling in *Griffiths*, some states, such as Louisiana, have continued to limit licensing procedures and also deny licensure to certain classes of immigrants. These states draw a distinction between LPRs and those foreign nationals “admitted temporarily and for a specific purpose,” referred to as nonimmigrants.⁶ But courts have differed on whether to permit such a distinction. While the *LeClerc* court upheld the Louisiana Supreme Court’s decision, barring nonimmigrants from taking licensing exams, the United States District Court for the Southern District of New York invalidated a similarly restrictive law in *Adusumelli v. Steiner*.⁷ In *Adusumelli*, a New York education law limited U.S. citizens and LPRs to be licensed as pharmacists, leading a group of 26 nonimmigrant plaintiffs to file suit.⁸ The court overturned the law and allowed the nonimmigrant plaintiffs to take the licensing exams.⁹

The *Adusumelli* court provides a model that other courts, including the U.S. Supreme Court, should follow. Courts should not use the distinction between LPRs and nonimmigrants to deny foreign nationals the opportunity to enter licensed professions in the U.S. Nonimmigrants with the necessary skills and knowledge to successfully enter professions such as law, medicine, and engineering should be encouraged to enter the U.S. market without unnecessary and irrational barriers.

This article argues that federal immigration law preempts state laws that prohibit nonimmigrants from taking state licensing exams. These state laws occupy the field of immigrant employment authorization, which is the domain of the federal government. In doing so, they stand as an obstacle to

the federal government's decision regarding a foreign national's admission into the U.S., placing conditions upon U.S. residency that are absent from federal law. Furthermore, under an equal protection analysis, there is no significant distinction between immigrants and nonimmigrants, and therefore, all classifications based on alienage should be subject to strict judicial scrutiny.

Part I of this article describes the distinction between immigrants and nonimmigrants, explaining the reasoning and distinctions that states have used to justify the denial of licensure to nonimmigrants. Parts II and III discuss the legal issues regarding professional licensing for immigrants and nonimmigrants, respectively. Parts II and II also include a discussion of the *Griffiths*, *LeClerc* and *Adusumelli* decisions and their impact on federal immigration law. Part IV outlines the policy implications of a distinction between immigrants and nonimmigrants in state licensing procedures. Specifically, Part IV discusses the harm done to nonimmigrants, U.S. employers, and the U.S. as a whole, when laws, regulations, and court decisions deny nonimmigrants the opportunity to enter licensed professions. Part V is a legal analysis of the distinction between immigrants and nonimmigrants. This section applies legal tests to examine how federal law preempts restrictive state licensure laws, and argues for similar preemption during an equal protection analysis. Part VI concludes the article, and argues for the elimination of state licensure laws that prohibit nonimmigrants from obtaining licensure.

I. DISTINCTION BETWEEN IMMIGRANTS AND NONIMMIGRANTS

The Department of Homeland Security (DHS) groups foreign nationals seeking to enter the U.S. into two broad categories: nonimmigrants and immigrants. Nonimmigrants are foreign nationals that are "admitted temporarily and for a specific purpose."¹⁰ Several categories of foreign nationals fall into the broader category of nonimmigrants, including temporary workers, students, foreign diplomats, tourists, and business travelers.¹¹ The complete list of nonimmigrant visa classifications is set forth in the subsections of Section 101(a)(15) of the Immigration and Naturalization Act (INA).¹²

Nonimmigrants are restricted both on the amount of time they can be present in the United States, and the activities in which they can participate.¹³ For instance, a nonimmigrant admitted on a student visa does not have unfettered work authorization, as the individual is limited to the practical training that relates to the nonimmigrant's student visa. Moreover, a nonimmigrant admitted as a temporary worker does not have authorization to attend a university.

Generally, nonimmigrants must express their intent to stay in the U.S. only for a short period of time. However, the U.S. Department of State (State Department) has recognized a doctrine of "dual intent" for certain classes of nonimmigrants.¹⁴ After the Immigration Act of 1990, the State Department concluded that Congress should eliminate nonimmigrant intent as a factor in adjudicating applications for H-1 visas, which are used by temporary workers in specialty occupations, and L visas, which are used by intra-company transferees.¹⁵ Thus, an applicant in either visa category can come to the U.S. in nonimmigrant status, while simultaneously pursuing permanent residence status.

The INA defines "immigrants" as "every alien except an alien who is within one of the . . . classes of nonimmigrant aliens" listed in Section 101(a)(15).¹⁶ Under Section 214(b) of the INA, immigration officials must presume that all foreign nationals entering the U.S. intend to immigrate to the U.S. permanently. But this intention is not presumed for those entering the U.S. in the L, V, and H-1 visa categories.¹⁷ Thus, all foreign nationals entering the U.S. as legal permanent residents (LPRs) are immigrants.

II. LICENSING AND IMMIGRANTS (LEGAL PERMANENT RESIDENTS)

In the 1886 landmark case of *Yick Wo v. Hopkins*, the Supreme Court allowed Chinese immigrants to bring an equal protection challenge against a San Francisco laundry ordinance, which was being discriminately enforced against them.¹⁸ The 14th Amendment to the U.S. Constitution prohibits states from denying equal protection under U.S. law to persons within the several states.¹⁹ In *Yick Wo*, the Court established that lawfully present resident aliens were considered "persons" within the meaning of the equal protection clause of the 14th Amendment.²⁰

In *Graham v. Richardson*, in determining whether the states of Arizona and Pennsylvania could deny government assistance to resident aliens, the Court went a step further than the *Yick Wo* Court. It declared, “classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.”²¹ In *Graham*, the states posited that they had a “special public interest” in distribution of government resources toward its own citizens.²² The Court rejected this argument, noting that resident aliens also pay taxes, and that “[t] here can be no ‘special public interest’ in tax revenues to which aliens have contributed on an equal basis with the residents of the State.”²³

In 1973, the Court in *In re Griffiths* specifically addressed the question of state licensing laws for LPRs. In *Griffiths*, an LPR with citizenship in the Netherlands satisfied all the qualifications for admission to the Connecticut bar, except for the requirement that an applicant had to be a U.S. citizen to be admitted to the bar.²⁴ The Court again applied strict judicial scrutiny, and emphasized that because resident aliens pay taxes, may serve in the Armed Forces, and contribute to society in a variety of ways, they should not be denied the opportunity to become licensed professionals.²⁵ Thus, the Court placed a heavy burden on states in justifying the denial of employment opportunities based on alienage.²⁶

The *Griffiths* Court noted that states have a legitimate interest in ensuring that those admitted to the bar meet “the character and general fitness requisite for an attorney and counselor-at-law.”²⁷ However, the Court found that the character and general fitness requirements were not used by the state of Connecticut to exclude bar membership for foreign nationals.²⁸ Instead, the state justified the exclusion by noting that foreign nationals may have a divided allegiance to the U.S. that would impede their ability to carry out certain duties, such as signing writs and subpoenas, and administering oaths.²⁹

The Court found the state’s “divided allegiance” argument unconvincing. The decision noted that these duties “hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens.”³⁰ Furthermore, the Court opined that although some resident aliens may be unsuited for the bar, it does not justify a wholesale exclusion of resident aliens.³¹ In the Court’s opinion, the continued scrutiny attorneys face once admitted

to the bar, such as sanctions and disbarment, would reduce unethical behavior in resident alien attorneys.³²

The Court has applied the same reasoning from *Griffiths* in other cases, prohibiting states from limiting access to professions based on alienage. In *Sugarman v. Dougall*, the Court struck down a New York state law that limited the appointment of competitive civil service jobs to U.S. citizens, and excluded aliens.³³ Likewise, in *Examining Board of Engineers v. Flores de Otero*, the Court struck down a Puerto Rican law that limited the granting of civil engineering private practice licenses to U.S. citizens.³⁴

The Court has delineated two exceptions to the general rule that states cannot deny employment opportunities based on alienage. First, the Court has recognized that states can have a legitimate interest in limiting the access to employment that serves a political and governmental function to U.S. Citizens.³⁵ For instance, in *Foley v. Connelie*, the Court upheld a New York state law that permitted only U.S. citizens to be employed by the state police force.³⁶ Second, a state may deny employment opportunities to those who are not lawfully present in the U.S.³⁷ For example, in *DeCanas v. Bica*, the Court upheld a California law imposing criminal sanctions on employers who knowingly employ immigrants without work authorization, which result in fewer employers willing to hire undocumented workers.³⁸

III. LICENSING AND NONIMMIGRANTS

While the Supreme Court has struck down laws that prohibit non-citizens from entering licensed professions, it has never directly addressed the issue of whether states may distinguish between immigrants and nonimmigrants in their licensure procedures. However, lower courts have addressed the issue and have reached varied conclusions.

In *LeClerc*, the U.S. Court of Appeals for the Fifth Circuit considered a Louisiana Supreme Court rule that restricted the admission of U.S. citizens and resident aliens to the Louisiana bar.³⁹ The Louisiana Supreme Court in *In Re Bourke*, interpreted the phrase “resident alien” to include “only . . . those aliens who have attained permanent resident status in the United States.”⁴⁰ Challenging this decision, the plaintiffs in *LeClerc* claimed that the Court in *Griffiths*, in applying strict judicial scrutiny to a law affecting LPRs,

supported the proposition that all immigrants were a suspect class (a class for which all laws discriminating against the class are inherently suspect) and, therefore, the Louisiana rule is subject to strict scrutiny.⁴¹ This line of reason follows from the *Graham* court's reasoning that it is inherently suspect for a law to use classifications based on alienage and, therefore, such laws should be subject to strict scrutiny.⁴²

The Fifth Circuit disagreed with the plaintiffs, stating that nonimmigrants "are not a suspect class under *Griffiths*."⁴³ The court noted a "paramount" distinction between the plaintiffs in *LeClerc* and the plaintiffs in *Griffiths*, as the former was a group of nonimmigrants and the latter was a group of LPRs.⁴⁴ The court noted that nonimmigrants "ordinarily stipulate before entry to this country that they have no intention of abandoning their native citizenship."⁴⁵ In the eyes of the court, nonimmigrants are not "similarly situated" to U.S. citizens in the way that permanent residents are because of their temporary connection to the U.S. Because of this temporary and dissimilar connection, nonimmigrants are not entitled to strict judicial scrutiny.⁴⁶ The court upheld the Louisiana rule applying rational basis review.⁴⁷

The *Adusumelli* court reached a different conclusion.⁴⁸ In *Adusumelli v. Steiner*, the U.S. District Court for the Southern District of New York considered a New York education law that limited the ability of U.S. citizens and permanent residents to be licensed as pharmacists.⁴⁹ The twenty-six plaintiffs in *Adusumelli* were nonimmigrant pharmacists residing in the U.S., either with H-1B visas or "TN" temporary worker status (a status created by the North American Free Trade Agreement (NAFTA) for citizens of Canada and Mexico).⁵⁰

The *Adusumelli* court found that the state law interfered with federal immigration power reserved for Congress in the U.S. Constitution through the Naturalization Clause, which gives Congress the power to "establish a uniform Rule of Naturalization", and the Supremacy Clause, which states that the Constitution and other federal laws will be the supreme law of the land.⁵¹ The state argued that Congress explicitly gave states discretion in this field through 8 C.F.R. § 214.2(h)(4)(v)(A), which states that "[i]f an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien . . . seeking [a temporary work visa] in that occupation must have

that license prior to approval of the petition."⁵² The court, however, concluded that this merely outlines a division of labor, finding that the federal government determines admissibility, while the state determines professional competence.⁵³

The State of New York, referencing *LeClerc*, noted that legal permanent residents pay taxes, can serve in the military, and can work in the U.S. indefinitely, whereas other foreign nationals have less in common with U.S. citizens.⁵⁴ The state argued that the plaintiffs, therefore, were not entitled to strict scrutiny in an equal protection analysis.⁵⁵ The court noted, however, that nonimmigrants are largely subject to the same tax rules as U.S. citizens, at least in regards to their U.S. income.⁵⁶

Additionally, the *Adusumelli* court referenced the doctrine of dual intent.⁵⁷ This doctrine allows holders of certain classes of visas to pursue permanent residence while residing in the U.S. as a nonimmigrant. Regarding this doctrine, the court noted that nonimmigrants are not as transient as other courts have characterized them to be, and that many nonimmigrants are in the process of applying for green cards.⁵⁸ The Supreme Court's decision in *Nyquist v. Mauclet*, played a pivotal role in the *Adusumelli* court's reasoning regarding the somewhat transient nature of nonimmigrants.⁵⁹ In *Nyquist*, the Supreme Court considered a New York law that denied financial assistance for higher education to those who had not applied for citizenship, or did not intend to do so once eligible.⁶⁰ The Supreme Court applied strict scrutiny in invalidating the law, and rejected the practice of discriminating against foreign nationals on the basis of transience.⁶¹

Furthermore, the *Adusumelli* decision noted that nonimmigrants are no less likely to be the victim of irrational discrimination than their LPR counterparts; in fact, they are more likely to be discriminated against.⁶² The court noted that when a group is subject to such irrational discrimination, courts usually apply at least heightened, or intermediate, scrutiny.⁶³ The court found that denial of an opportunity to obtain a pharmacist's license triggers at least intermediate scrutiny, and that it was unnecessary to determine whether to apply intermediate or strict scrutiny because the law would fail at either level.⁶⁴ The court found that the state was unable to show that there were "important governmental objectives and that the discriminatory means employed [were] substantially

related to the achievement of those objectives,” as required in intermediate scrutiny cases.⁶⁵

IV. POLICY IMPLICATIONS OF THE IMMIGRANT/NONIMMIGRANT LICENSING DISTINCTION

Restrictive state licensure laws deny opportunities to highly educated and qualified foreign workers, who not only benefit the U.S. workforce, but also the nation as a whole. Congress did not create multiple categories of nonimmigrant work visas haphazardly. For instance, with the H-1B visa, Congress intentionally promoted the inclusion of highly educated and qualified foreign nationals into the U.S. workforce. The H-1B classification is a visa category that allows foreign nationals who work in “specialty occupations” to seek employment in the U.S.⁶⁶ The law defines a “specialty occupation” as one that requires a “theoretical and practical application of a body of highly specialized knowledge,” and a bachelor’s degree or its equivalent.⁶⁷ While full-state licensure is required to practice in a specific state, the law does not permit states to create separate requirements or deny licenses based on alienage.⁶⁸

In determining whether foreign nationals should be able to work in the U.S., either on a temporary or permanent basis, Congress evaluated the costs and benefits of immigration. Regarding licensed professions, foreign nationals must meet the same requirements of licensure as other U.S. citizens; however, there is no indication that Congress intended for foreign nationals to meet additional requirements.

Furthermore, when state licensing requirements for foreign nationals are not uniform, the inconsistency creates uncertainty for foreign nationals who wish to enter a licensed profession. Numerous professions require licensure to practice in multiple states, but because of the varied nature of state licensure recruitments, a foreign national admitted to practice in one state may be ineligible in another. Likewise, a foreign national who wishes to transfer jobs once in the U.S., could face barriers that U.S. citizens and permanent residents do not encounter. For instance, an attorney with an H-1B visa practicing law in New York would not be able to transfer to a job in Louisiana, regardless if the attorney had the knowledge and skill necessary to pass the

Louisiana bar. Essentially, these requirements reduce the freedom of nonimmigrants, and discourage foreign nationals from accepting new employment or changing jobs.

Proponents of restrictive licensure laws contend that licensed professionals who are non-U.S. citizens, or are LPRs, are more likely to be transient, and are likely to leave their job after a relatively short period of time and return to their native country. To mitigate these concerns regarding transience, U.S. immigration policy should encourage licensed professionals to remain in the U.S. With dual intent visas, such as H-1B and L-1 visas, even nonimmigrants have a way to become citizens, which reduces the risk of transience. While some professionals may come to the U.S. without the intent to remain permanently, immigration policy should balance the risk of transience against the benefits these foreign nationals could provide during their temporary employment. These benefits, although temporary, greatly outweigh the negative effects of transience.

Domestic employers benefit tremendously from their ability to hire the best professionals from around the world. Likewise, the nation as a whole benefits from being able to obtain high quality professional services, and arbitrary obstacles based on the nationality and immigration status only hinders this ability. Thus, states should not only permit foreign nationals to apply for such licensure, they should encourage it.

V. LEGAL ANALYSIS OF THE IMMIGRANT/NONIMMIGRANT DISTINCTION

A. Federal immigration law supersedes state laws that prohibit nonimmigrants from entering licensed professions

As the *Adusumelli* court noted, the federal government has sole power to implement U.S. immigration policy. As previously stated, this power comes from the U.S. Constitution through the Naturalization Clause, and the Supremacy Clause.⁶⁹ Various courts have used the *DeCanas* tests, which is described below, to determine whether federal law preempts a state law that affects immigration. Although the *Adusumelli* court referred to the *DeCanas* case and tests, and reached a conclusion in harmony with the tests, it did so without explicitly applying

them. This section will analyze and apply the *DeCanas* tests to the immigrant/nonimmigrant distinction.

***DeCanas* Tests**

In *League of United Latin American Citizens v. Wilson* (*LULAC*), the U.S. District Court for the Central District of California reviewed a voter-approved initiative. The initiative gave state officials the authority to verify the immigration status of people with whom they come in contact, and deny health care, education, and other benefits based on their determination.⁷⁰ In determining whether the initiative at issue in *LULAC* was preempted by federal law, the District Court looked to the Supreme Court case of *DeCanas v. Bica*.⁷¹ In *DeCanas*, migrant farm workers in California challenged a state law that placed criminal sanctions upon employers who knowingly employed undocumented immigrants, if such employment adversely affected lawful resident workers.⁷²

The Court in *DeCanas* proffered three tests to assist in their analysis of the state law. The first *DeCanas* test requires a court to determine whether the state action is a “regulation of immigration.”⁷³ The *DeCanas* Court defines “regulation of immigration” as “essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”⁷⁴ However, not all state regulations that affect immigrants are “regulations of immigration.”⁷⁵ For example, in *DeCanas*, the Court dealt with a California law that imposed criminal sanctions on employers who knowingly hired immigrants without legal work authorization. This was found to be a regulation of employment, not a pre-empted “regulation of immigration.”⁷⁶

The second *DeCanas* test, requires a court to determine whether “Congress intended to ‘occupy the field’ which the statute attempts to regulate.”⁷⁷ Even if the state law is not a “regulation of immigration,” it may nevertheless be preempted if it occupies a field Congress has claimed for itself.⁷⁸ The *DeCanas* Court concluded that, for a state law to be preempted, the “clear and manifest purpose” of Congress must be “complete ouster of state power including state power to promulgate laws not in conflict with federal laws.”⁷⁹

The third *DeCanas* test requires the court to determine if a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁸⁰ This test was fashioned by the Supreme Court in *Hines v. Davidowitz*.⁸¹ In *Hines*, the Court examined a Pennsylvania law that set up a state level immigrant registration scheme, which had registration, information disclosure, and identification requirements for aliens beyond what was required by federal law.⁸² The Court decided that federal law preempted the Pennsylvania law because the federal government had exercised its constitutional authority to implement the standards for alien registration and states could not add to these requirements.⁸³

1. State licensure laws survive the first *DeCanas* test, because they are not regulations of immigration.

As noted above, a “regulation of immigration” is “essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”⁸⁴ However, if the state law primarily affects another field other than immigration, it is not considered a regulation of immigration.⁸⁵ This was the case in *DeCanas*, where the state sanctioned employers rather than determining the admission status of the immigrant, or altering the conditions under which an immigrant may remain in the U.S.⁸⁶ The Court described the California law as having a “purely speculative and indirect impact on immigration.”⁸⁷ In contrast, the *LULAC* court stated that to require a state official to question arrestees, applicants for state welfare benefits, students, and parents of students regarding their immigration status, was a regulation of immigration.⁸⁸ The court found that the primary purpose of the initiative was to place limitations on foreign nationals, and that federal law explicitly allows these individuals to enter and remain in the U.S. Accordingly, the court held that federal law preempted the state initiative.

State licensure laws that limit licensure to U.S. citizens and LPRs more closely resemble the state law at issue in *DeCanas*, rather than the initiative at issue in *LULAC*. Like *DeCanas*, state licensure laws do not specifically place conditions on who may remain in the U.S., rather these laws place regulations only on employment. The aim of state licensing bodies is to

ensure that those who receive professional licenses meet the profession's minimum qualifications and standards. Because this is a permissible state function, the fact that immigration status is a factor that a licensing body may find relevant, nevertheless does not make it a regulation of immigration.

One might argue that like the initiative in *LULAC*, prohibitive state licensing laws place conditions on those who may remain in the U.S. and, thus, fail the first *DeCanas* test. However, the aim of the state licensing bodies is not to determine who may or may not enter or remain in the country. The licensing bodies' only concern is with the standards for admission into the various professions. Thus, while an argument comparing state licensing laws to *LULAC* is interesting, it is likely not compelling enough to invalidate these state licensure laws.

2. Prohibitive state licensure laws fail the second *DeCanas* test, as Congress intended to occupy the field of immigrant admissions.

The second *DeCanas* test notes that federal law preempts state or local law, regardless of whether it is a "regulation of immigration," if Congress intended to "occupy the field" that the state law seeks to regulate.⁸⁹ Under this test, federal law preempts state law only if Congress's clear and manifest purpose is a complete ouster of state regulatory power within the field.⁹⁰

In *DeCanas*, the Court noted that states have "broad authority under their police powers to regulate the employment relationship to protect workers within the State."⁹¹ Therefore, the state in *DeCanas* had the power to ensure that California employers would not employ those individuals not lawfully authorized to work in the U.S.⁹² The Court found no compelling evidence that Congress, through the INA, intended to oust state powers to regulate employment to ensure a lawful workforce.⁹³ Therefore, the California law survived the second *DeCanas* test.⁹⁴

State licensure laws are distinguishable from *DeCanas* in this regard. State licensing bodies have the authority to determine the standards for admission to a profession. This is a different type of authority than the police power at issue in *DeCanas*. The state in *DeCanas* merely determined whether employees met federal standards for lawful employment, whereas

state licensure boards create standards for admission at the state level to various professions.

It is evident that the federal government sought to occupy the field of immigrant admissions. The federal government determines what the standards and requirements are for admission to the U.S. through a nonimmigrant visa, and adjudicates individuals on a case-by-case basis. For instance, with H-1B visas, Congress has determined the qualifications necessary to work in the U.S. in a specialty occupation.⁹⁵ While state licensure is required prior to issuance of a visa, the *Adusumelli* court correctly noted a division of labor.⁹⁶ The federal government retains its domain over determinations of admissibility, and the state government determines professional competence.⁹⁷

3. Prohibitive state licensure rules violate the third *DeCanas* test as they stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Under the third *DeCanas* test, federal immigration law preempts state and local regulations when they are found to be obstacles to "the accomplishment and execution of the full purposes and objectives of Congress."⁹⁸ The *LULAC* court stated this test somewhat differently, noting there is preemption if state laws conflict with federal law, and compliance with both is impossible.⁹⁹ The Court in *Hines v. Davidowitz* utilized this compliance test.

In *Hines*, the Court struck down annual registration and state identification requirements, because the federal government has its own uniform registration and identification requirements.¹⁰⁰ Similarly, the classification, notification, and cooperation/reporting provisions of the initiative at issue in *LULAC*, violated the third *DeCanas* test, because they conflicted with federal deportation laws.¹⁰¹ Furthermore, federal law preempted provisions of the *LULAC* initiative that denied state benefits to immigrants when state officials reasonably suspected that an immigrant was not lawfully present. The Court held that the initiative was preempted because a state official's "reasonable suspicion" is not the same as verification under federal law.¹⁰²

Similarly, prohibitive state licensure laws directly conflict with federal immigration policy,

and are in violation of the third *DeCanas* test. The federal government determines whether foreign nationals meet the requirements to work in the U.S. through nonimmigrant work visas. This includes a determination of whether these individuals are qualified to practice in the specific specialty occupation. And generally, one of the requirements for foreign nationals to obtain employment is to first become licensed by the state in their particular field. Thus, a foreign national must be able to take bar exams, medical licensing exams, etc. to determine admissibility. When a state determines that nonimmigrants are ineligible to take such an exam, the state stands as an obstacle to the federal government's determination of admissibility.

- B. *There is no significant distinction between immigrants and nonimmigrants for purposes of equal protection analysis and strict scrutiny should also apply to laws affecting nonimmigrants.*

As noted above, the Supreme Court in *Yick Wo* determined that legally present resident aliens are "persons" for the purpose of an equal protection analysis.¹⁰³ Furthermore, classifications based on alienage are subject to strict judicial scrutiny, and the Court will apply this strict scrutiny to laws affecting LPRs.¹⁰⁴

Despite the Supreme Court's application of strict scrutiny to alienage classifications, during an equal protection analysis the *LeClerc* court drew a distinction between immigrants and nonimmigrants.¹⁰⁵ The *Adusumelli* court disagreed with the *LeClerc* court, noting that nonimmigrants are generally subject to the same federal income tax rules as their LPR and U.S. citizen counterparts.¹⁰⁶ Furthermore, the doctrine of dual intent allows certain nonimmigrants to seek permanent residence in the U.S., while residing in the U.S. on temporary visas.¹⁰⁷

The *Adusumelli* court's analysis is correct and the most viable. However, the court did not reach a holding as to whether strict scrutiny or intermediate scrutiny should apply to laws affecting nonimmigrants. The court found the determination of the level of judicial scrutiny pointless, because the licensing law under either standard would fail.¹⁰⁸ Despite the Court's decision to forgo such a holding, its analysis strongly suggests that laws affecting nonimmigrants should be subject to strict scrutiny.

The *Adusumelli* court noted that the Supreme Court in *Nyquist* applied strict scrutiny to a law affecting foreign nationals who had not, and did not intend to apply for permanent residency.¹⁰⁹ Therefore, it logically follows from *Nyquist* that strict scrutiny should apply to licensing laws preventing nonimmigrants from entering licensed professions. Furthermore, the *Graham* Court's reason for determining that classifications based on alienage are subject to strict scrutiny was that such a classification was inherently suspect, and that immigrants are a "discrete and insular minority."¹¹⁰ Classifications that affect nonimmigrants are no less inherently suspect than classifications that affect LPRs, and nonimmigrants are certainly a discrete and insular minority.

Should the Supreme Court consider a case regarding licensing of nonimmigrants, the Court should clarify that its application of strict scrutiny to classifications based on alienage covers all foreign nationals, regardless of whether they are immigrants or nonimmigrants.

VI. CONCLUSION

The state licensing process for professionals should be open to U.S. citizens, immigrants, and nonimmigrants alike. Federal immigration power preempts states laws that prohibit nonimmigrants from entering professions such as law, medicine and engineering. Moreover, Congress has occupied the field of immigrant admissions, and, thus, these state licensing laws stand as an obstacle to federal determination of admissibility. Furthermore, such laws should be subject to strict scrutiny because there is no significant distinction between immigrants and nonimmigrants in an equal protection analysis.

Nonimmigrants who face the barriers such as ones faced by the plaintiffs in *LeClerc*, who are merely coming to the U.S. to better their lives by entering licensed professions, have a tough and precarious predicament, and deserve relief. The denial of an opportunity to enter their professions not only hurts the individuals, but U.S. employers, and citizens who would benefit from their work. Congress and state legislatures should eliminate prohibitive state licensure laws and regulations, such as the Louisiana bar rule. And if necessary, the courts should act and strike them down. If nonimmigrants can take the

licensing exams required for their field in all states, an impediment will disappear, uncertainty will dissipate, and highly educated and qualified workers will be encouraged to bring their skills to the U.S.

Endnotes

¹ Justin Storch is a second year student at American University Washington College of Law and a staff writer for *The Modern American*.

² *LeClerc v. Webb*, 419 F.3d 405, 410-12 (5th Cir. 2005).

³ *Id.* at 410-12.

⁴ *Id.* at 410.

⁵ *In re Griffiths*, 413 U.S. 717 (1973).

⁶ *Temporary Admissions of Nonimmigrant's to the United States: 2006*, OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., 1 (2007), http://www.dhs.gov/xlibrary/assets/statistics/publications/Ni_FR_2006_508_final.pdf.

⁷ *LeClerc*, 419 F.3d at 410; *Adusumelli v. Steiner*, 740 F. Supp. 2d 582 (S.D.N.Y. 2010).

⁸ *Adusumelli*, 740 F. Supp. 2d at 585.

⁹ *Id.* at 601.

¹⁰ *Temporary Admissions of Nonimmigrant's to the United States: 2006*, *supra* note 5.

¹¹ *Id.*

¹² Immigration and Nationality Act (INA) § 101(a) (15), 8 U.S.C.A. § 1101 (2010).

¹³ *Temporary Admissions of Nonimmigrant's to the United States: 2006*, *supra* note 5.

¹⁴ *State Dept. Liberalizes Dual Intent for H and L Nonimmigrants*, 68 No. 21 INTERPRETER RELEASES 681, 687-84 (1991).

¹⁵ *Id.* at 683.

¹⁶ 8 U.S.C.A. § 1101.

¹⁷ Immigration and Nationality Act (INA) § 214(b), 8 U.S.C.A. § 1184 (2009).

¹⁸ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

¹⁹ U.S. CONST. amend. XIV, § 1.

²⁰ *Yick Wo*, 118 U.S. at 369; U.S. CONST. amend. XIV, § 1.

²¹ *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

²² *Id.* at 372.

²³ *Id.* at 376.

²⁴ *In re Griffiths*, 413 U.S. 717, 718 (1973).

²⁵ *Id.* at 722.

²⁶ *Id.*

²⁷ *Id.* at 722-23.

²⁸ *Id.* at 723.

²⁹ *Id.* at 724.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 726.

³³ *Sugarman v. Dougall*, 413 U.S. 634, 643-49 (1973).

³⁴ *Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976).

³⁵ *Foley v. Connelie*, 435 U.S. 291, 295-96 (1978).

³⁶ *Id.*

³⁷ *DeCanas v. Bica*, 424 U.S. 351 (1976).

³⁸ *Id.*

³⁹ *LeClerc v. Webb*, 419 F.3d 405, 410 (5th Cir. 2005).

⁴⁰ *In re Bourke*, 819 So. 2d 1020, 1021-22 (La. 2002).

⁴¹ *LeClerc*, 419 F.3d at 410-15.

⁴² *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

⁴³ *LeClerc*, 419 F.3d at 415.

⁴⁴ *Id.*

⁴⁵ *Id.* at 417.

⁴⁶ *Id.* at 418.

⁴⁷ *Id.* at 420-22.

⁴⁸ *Adusumelli v. Steiner*, 740 F. Supp. 2d 582, 585 (S.D.N.Y. 2010).

⁴⁹ *Id.* at 585-86.

⁵⁰ *Id.* at 586.

⁵¹ *Adusumelli*, 740 F. Supp. 2d at 599; U.S. CONST. amend. XIV, § 1; U.S. CONST. art. VI, § 2.

⁵² *Adusumelli*, 740 F. Supp. 2d at 599; 8 C.F.R. § 214.2(h)(4)(v)(A) (2008).

⁵³ *Adusumelli*, 740 F. Supp. 2d at 597.

⁵⁴ *Id.* at 589.

⁵⁵ *Id.*

⁵⁶ *Id.* at 589-90.

⁵⁷ *Id.* at 592.

⁵⁸ *Id.*

⁵⁹ *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Adusumelli*, 740 F. Supp. 2d at 595.

⁶⁰ *Nyquist*, 432 U.S. at 10.

⁶¹ *Adusumelli*, 740 F. Supp. 2d at 593-94.

⁶² *Id.* at 596.

⁶³ *Id.*

⁶⁴ *Id.* at 598.

⁶⁵ *Adusumelli*, 740 F. Supp. 2d at 598; *see* U.S. v. Virginia, 518 U.S. 515, 533 (1996) (stating the government's burden in intermediate scrutiny cases).

- ⁶⁶ 8 U.S.C.A. § 1101.
- ⁶⁷ 8 U.S.C.A. § 1184.
- ⁶⁸ *Id.*
- ⁶⁹ *Adusumelli*, 740 F. Supp. 2d at 599; U.S. CONST. amend. XIV, § 1; U.S. CONST. art. VI, § 2.
- ⁷⁰ *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 763 (C.D. Cal. 1995).
- ⁷¹ *League of United Latin Am. Citizens*, 908 F. Supp. at 768; *DeCanas v. Bica*, 424 U.S. 351 (1976).
- ⁷² *DeCanas*, 424 U.S. at 352-53.
- ⁷³ *League of United Latin Am. Citizens*, 908 F. Supp. at 768.
- ⁷⁴ *DeCanas*, 424 U.S. at 355.
- ⁷⁵ *Id.*
- ⁷⁶ *Id.* at 356.
- ⁷⁷ *League of United Latin Am. Citizens*, 908 F. Supp. at 768.
- ⁷⁸ *Id.*
- ⁷⁹ *DeCanas*, 424 U.S. at 357.
- ⁸⁰ *League of United Latin Am. Citizens*, 908 F. Supp. at 768.
- ⁸¹ *DeCanas*, 424 U.S. at 363; *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).
- ⁸² *Hines*, 312 U.S. at 59.
- ⁸³ *Id.* at 72.
- ⁸⁴ *DeCanas*, 424 U.S. at 355.
- ⁸⁵ *Id.*
- ⁸⁶ *Id.*
- ⁸⁷ *Id.* at 355-56.
- ⁸⁸ *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 769 (C.D. Cal. 1995).
- ⁸⁹ *Id.* at 768.
- ⁹⁰ *DeCanas*, 424 U.S. at 357.
- ⁹¹ *Id.* at 356.
- ⁹² *Id.*
- ⁹³ *Id.* at 358.
- ⁹⁴ *Id.*
- ⁹⁵ 8 U.S.C.A. § 1184.
- ⁹⁶ *Adusumelli v. Steiner*, 740 F. Supp. 2d 582, 600 (S.D.N.Y. 2010).
- ⁹⁷ *Id.*
- ⁹⁸ *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 768 (C.D. Cal. 1995).
- ⁹⁹ *Id.* at 777.
- ¹⁰⁰ *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941).
- ¹⁰¹ *League of United Latin Am. Citizens*, 908 F. Supp. at 777.
- ¹⁰² *Id.* at 779.
- ¹⁰³ *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); U.S. CONST. amend. XIV, § 1.
- ¹⁰⁴ *Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 576 (1976); *In re Griffiths*, 413 U.S. 717, 724 (1973); *Graham v. Richardson*, 403 U.S. 365, 372 (1971).
- ¹⁰⁵ *LeClerc v. Webb*, 419 F.3d 405, 415 (5th Cir. 2005).
- ¹⁰⁶ *Adusumelli v. Steiner*, 740 F. Supp. 2d 582, 589-90 (S.D.N.Y. 2010).
- ¹⁰⁷ *Id.* at 592.
- ¹⁰⁸ *Id.* at 598.
- ¹⁰⁹ *Nyquist v. Mauclet*, 432 U.S. 1, 10 (1977).
- ¹¹⁰ *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *see* *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152-53 n. 4 (1938) (referencing “discrete and insular minority”).